BUMIPUTRA-COMMERCE BANK BHD, KUALA TERENGGANU

v.

CHENDERING DEVELOPMENT SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
PAJAN SINGH GILL JCA
RAHMAH HUSSAIN JCA
[CIVIL APPEAL NO: T-02-420-00]
29 JANUARY 2004

CONTRACT: *Loan - Overdraft facilities - Facilities granted to housing developer for bridging finance of housing project - Bank recalled facilities for non-payment of interest - Whether recall for non-payment of interest unlawful and improper - Whether interest to be capitalized during bridging period - Whether bank in breach of contract - Whether bank to pay damages - Whether damages remote*

BANKING: *Banks and banking business - Overdraft facilities - Facilities granted to housing developer for bridging finance of housing project - Bank recalled facilities for non-payment of interest - Whether recall for non-payment of interest unlawful and improper - Whether interest to be capitalized during bridging period - Whether bank in breach of contract - Whether bank to pay damages - Whether damages remote*

The appellant bank filed a suit against the respondent housing developer for the default of an overdraft facility ('the facility') granted for bridging finance of a housing project undertaken by the respondent. The respondent then filed a suit against the appellant to recover damages as a result of a breach of the agreement ('the agreement') granting the facility. Both suits were subsequently consolidated by an order of the court before they were tried by the learned judge who subsequently found in favour of the respondent granting, *inter alia*, damages in the sum of RM29,279,017.58. The appellant now appealed to this court.

Held:
Per Rahmah Hussain JCA

[1] The learned judge rightfully found as a fact that this was a contract for a definite purpose that was clearly known to the appellant and within its contemplation. It was also a term of the agreement that the interest due

on the facility during the pre-construction period was to be capitalized. As such, the call on the respondent to service interest and the subsequent recall of the loan facility for non-payment of interest was unlawful and improper *(Bank Bumiputra Malaysia Bhd Kuala Lumpur v. Mae Perkayuan Sdn Bhd)*. The appellant's own witness had confirmed in cross-examination that the facility had been recalled for failure to service interest. Apart from this, the other issues taken into consideration by the learned judge were findings of fact which this court should not interfere as the learned judge had the benefit of observing the credibility and demeanor of the witnesses during the trial. (pp 789 c-g & 790 a)

[2] As to the appellant's objection to the respondent's exhibits tendered in cross-examination, the said exhibits were tendered to show that the respondent was able and willing to carry out and complete the project. Also, to rebut the appellant's contentions that the respondent had given up the project and that the respondent would not in any event been able to carry out the project as it did not have a developer's license. The matters raised were never put to the respondent's witness in cross-examination. Further, the appellant never challenged the said exhibits at the trial. Therefore, it was not open for the appellant now to object to the admission of the said exhibits in evidence. (p 793 b-c)

[3] As the project paper was unavailable, the learned judge correctly relied on secondary evidence in the form of exh. D1 and the oral evidence of the respondent's witnesses to ascertain the extent of the profits that would have been made by the respondent if the project had been carried through. The learned judge also correctly took into account of the fact that exh. D1 was never challenged in cross-examination. (p 793 e)

[4] The proper measure of damages was not the normal measure of damages under s. 74(1) of the Contracts Act 1950. This was not a simple contract to lend money but a contract for a definite purpose. The purpose was clearly within the knowledge of the parties at the time of entering into the agreement and the consequence of its breach must have been within the contemplation of the parties. Thus all losses claimed by the respondent out of the transaction between the parties arose naturally from the breach by the appellant. The losses were also within the contemplation of the parties as likely to arise from such a breach within the requirements of s. 74 of the Contracts Act 1950 and the rule in *Hadley v. Baxendale*. The learned judge was therefore correct in holding that once it was shown that the kind of damages claimed was foreseeable, then the guilty party was liable to the full extent of it so long as the extent of damages had been shown on

the balance of probabilities. The learned judge had correctly assessed damages upon a consideration of the legal principles and also upon an analysis of the similarity of facts in the present proceedings and in *Mae Perkayuan*. (p 795 b-e)

[5] The appellant's contention that no particulars of damages were pleaded was unsustainable. The respondent had led evidence to the extent of losses suffered. No objection was taken that particulars of such losses were not pleaded in the statement of claim and that such evidence was inadmissible. As such, it was too late in the day for the appellant to raise this objection. The damages awarded to the respondent in the sum of RM29,279,017.58 was not remote as the damages for loss of profits was based on computation as set out in exh. D1 which was in the possession of the appellant and directly within its contemplation. On mitigation of losses, the respondent had taken adequate steps to mitigate its losses. (pp 795 g & 796 a-e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu bank telah memfail tindakan terhadap responden pemaju perumahan atas kegagalan membayar balik kemudahan overdraf ('kemudahan') yang diberikan sebagai pembiayaan awal projek perumahan yang dibangunkan oleh responden. Berikutnya responden memfail tindakan terhadap perayu bagi mendapatkan gantirugi kerana pelanggaran perjanjian ('perjanjian') yang memberikan kemudahan. Kedua-dua guaman telah disatukan oleh mahkamah sebelum dibicarakan oleh yang arif hakim yang kemudian membuat dapatan yang berpihak kepada responden sekaligus membenarkan, antara lain, gantirugi sebanyak RM29,279,017.58. Perayu kini merayu ke mahkamah ini.

Diputuskan:
Oleh Rahmah Hussain HMR

[1] Yang arif hakim membuat dapatan fakta yang betul bahawa terdapat perjanjian bagi satu tujuan tertentu yang jelas diketahui dan disedari perayu. Adalah juga merupakan terma perjanjian bahawa faedah atas kemudahan yang menjadi terbayar dalam tempoh pra-pembinaan harus dipergunakan. Oleh yang demikian, tuntutan supaya responden membayar faedah dan penarikan balik pinjaman selepas itu kerana ketiadaaan bayaran adalah tidak sah dan tidak wajar *(Bank Bumiputra Malaysia Bhd v. Mae Perkayuan Sdn Bhd)*. Saksi perayu sendiri telah mengesahkan dalam pemeriksaan balas bahawa kemudahan ditarik balik kerana kegagalan membayar faedah. Selain

itu, isu-isu lain yang dipertimbang oleh yang arif hakim merupakan dapatan fakta yang mana mahkamah ini tidak harus mengganggu inya kerana yang arif hakim mempunyai kelebihan memerhati kredibiliti dan tingkah laku saksi-saksi sewaktu perbicaraan.

[2] Berkenaan bantahan perayu terhadap eksibit-eksibit yang diserahkan responden semasa pemeriksaan balas, eksibit-eksibit tersebut diserahkan untuk menunjukkan bahawa responden berupaya dan bersedia untuk menerus dan menjayakan projek. Juga, bagi menyangkal tohmahan perayu bahawa responden telah memberhentikan projek dan bahawa responden tidak mampu meneruskan projek kerana tidak mempunyai lesen pemaju. Hal-hal yang dibangkitkan tidak pernah diajukan kepada saksi-saksi responden dalam pemeriksaan balas. Selain itu, perayu tidak pernah mencabar eksibit-eksibit tersebut semasa perbicaraan. Dengan demikian ianya tidak terbuka bagi perayu untuk membantah penerimaan masuk eksibit-eksibit tersebut sebagai keterangan sekarang.

[3] Disebabkan ketiadaan kertas projek, yang arif hakim telah dengan betulnya bergantung kepada keterangan sekunder iaitu eks. D1 serta keterangan lisan saksi-saksi responden bagi menentukan tahap keuntungan yang bakal diperolehi responden jika ia berjaya menyiapkan projek. Yang arif hakim juga telah dengan betulnya mengambil kira fakta bahawa eks. D1 tidak pernah dicabar semasa pemeriksaan balas.

[4] Ukuran gantirugi wajar bukan ukuran gantirugi biasa di bawah s. 74(1) Akta Kontrak 1950. Ini bukan suatu kontrak mudah untuk meminjam wang tetapi adalah kontrak untuk tujuan tertentu. Tujuannya beserta dengan akibat-akibatnya adalah dalam jangkaan dan pengetahuan pihak-pihak semasa memeterai perjanjian. Adalah dengan itu jelas bahawa semua kerugian yang dituntut responden adalah berbangkit secara semula jadi akibat pelanggaran oleh perayu. Kerugian-kerugian adalah dalam jangkaan pihak-pihak, iaitu ia boleh dijangka timbul dari pelanggaran sedemikian dan dengan itu memenuhi kehendak s. 74 Akta Kontrak 1950 dan prinsip *Hadley v. Baxendale*. Yang arif hakim dengan itu betul dalam dapatannya bahawa sebaik sahaja bentuk gantirugi dibuktikan sebagai boleh dijangka, maka pihak yang bersalah adalah bertanggungan sepenuhnya selagi tahap gantirugi tersebut dapat dibuktikan atas imbangan kebarangkalian. Yang arif hakim juga telah menilai gantirugi dengan betul dengan mengambil kira prinsip-prinsip perundangan serta berdasarkan analisa persamaan fakta dalam kes semasa dan *Mae Perkayuan*.

[5] Hujah perayu bahawa tiada butiran gantirugi telah diplid tidak boleh dipertahankan. Responden telah mengemukakan keterangan berkenaan tahap kerugian yang ditanggung. Tiada bantahan dibuat dalam penyata tuntutan bahawa butir-butir kerugian tersebut tidak diplid atau bahawa ianya tidak boleh diterima masuk sebagai keterangan. Oleh itu, ianya sudah terlambat bagi perayu untuk membangkitkan bantahan ini. Gantirugi sebanyak RM29,279,017.58 bukanlah di luar duga kerana gantirugi bagi kehilangan keuntungan diasaskan kepada perkiraan seperti dalam eks. D1 yang dimiliki dan diketahui perayu. Berkenaan soal pengurangan kerugian, responden telah mengambil langkah-langkah yang memadai bagi mengurangkan kerugiannya.

Rayuan ditolak.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 3 CLJ 639 CA ***(refd)***

Bank Bumiputra Malaysia Bhd v. Kuala Lumpur v. MAE Perkayuan [1993] 2 CLJ 495 ***(foll)***

Flint v. Lovell [1935] IKB 354 ***(refd)***

Hadley v. Baxendale [1854] 9 Ex 341 ***(refd)***

Manchester & Oldham Bank Ltd v. WA Cook & Co [1883] 49 LT 674 ***(refd)***

Oversea-Chinese Banking Corporation Ltd v. Philip Wee Kee Puan [1984] 2 CLJ 4; [1984] 1 CLJ (Rep) 25 PC ***(refd)***

Renal Link (KL) Sdn Bhd v. Dato' Harnam Singh [1997] 3 CLJ 225 CA ***(refd)***

Tan Sri Khoo Teck Huat v. Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 FC ***(refd)***

Teo Hock Guan & Anor v. Johore Builders & Investments Sdn Bhd [1996] 4 CLJ 184 CA ***(refd)***

Toeh Kee Keong v. Tambun Mining Company Ltd [1968] 1 MLJ 39 ***(refd)***

Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd; Coulson & Co Ltd [1949] 2 KB 528 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 74(1)

Rules of the Court of Appeal 1994, O. 7 r. 3A

Other source(s) referred to:

Chitty on Contracts, 28th edn 1999, para 27-045

Mc Gregor, *Damages*, 16th edn 1997

For the appellant - Tommy Thomas (Peter Pereira); M/s Tommy Thomas

For the respondents - B Thangaraj (Cecil Abraham & Mokhtar Ngah); M/s Thangaraj & Assoc, M/s Shearn Delamore & Co, M/s Mokhtar Ngah

[Appeal from High Court, Kuala Terengganu; Civil Suit No: 23-58-1986]

Reported by Usha Thiagarajah

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JUDGMENT

Rahmah Hussain JCA:

This is an appeal by Bumiputra-Commerce Bank Berhad against that part of the decision of the High Court Judge at Kuala Terengganu, given on 29 June 2000 which decided that:

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(1) Bumiputra-Commerce Bank Berhad do pay to Chendering Development Sdn Bhd the sum of RM29,279,017.58 representing loss of profits with interest at the rate of 5% per annum from 5 November 1984 until date of judgment and thereafter at the rate of 8% per annum until date of

c satisfaction of judgment;

(2) Muda bin Mohamed sued as guarantor is not liable to pay Bumiputra-Commerce Bank Berhad the amount owing under the overdraft facility granted to Chendering Development Sdn Bhd;

d (3) Bumiputra-Commerce Bank Berhad is not entitled to interest at the agreed contractual rate on the amount disbursed under the overdraft facility; and

(4) each party bears their own costs.

Two suits, which arose out of the same set of facts and involving the same

e loan transaction between Bank Bumiputra Malaysia Berhad (the bank), now called Bumiputra Commerce Berhad and Chendering Development Sdn. Bhd. ("Chendering") were consolidated by order of Court of 23 October 1989 and came up for hearing in the High Court Kuala Terengganu. In the first suit (No. 23-58-1986), the bank sued Chendering as principal borrowers and three

f others as guarantors. In the second suit (No. 22-10-90), Chendering sued the bank to recover damages as a result of a breach of an agreement between them.

Now, the factual background of the case is as follows: By an agreement dated 11 March 1982 ("the agreement") the bank (appellant) granted to Chendering (first respondent) a conditional overdraft facility for a sum, not exceeding RM5

g million. The facility is expressed to be for 3 specific purposes. They are, firstly to enable Chendering to complete the purchase of two parcels of adjoining agricultural land held under title Nos: 1489 and 1490, Lot Nos: 2199 and 2200, Mukim of Kijal, in the District of Kemaman, in the State of Terengganu (the subject land) respectively; secondly, to provide fees for Chendering to convert

h the land use from agricultural to residential and then to sub-divide the land into lots for building houses for sale to the public at a profit; thirdly, to help finance the construction, infrastructure and management cost. The security for the facility is a first legal charge on the subject land. The Directors of

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Chendering were also required to execute guarantees. The duration of the facility was "subject to yearly review". Interest was fixed at 13% per annum, and subject to review, with the bank being granted an absolute discretion to vary the rate of interest from time to time. Any non-payment of interest was caused to be capitalized and added to the principal sum, with interest chargeable thereon at the same rate.

Chendering was obliged to repay to the bank monies lent under the facility on the happening of any of three events:

(a) repayable in full on demand;

(b) expiry of facility; or

(c) by way of redemption of titles.

The agreement also had very specific terms and conditions relating to disbursements. For convenience and ease of reference the relevant clause is reproduced in its entirety below. It reads:

Disbursement: a) An amount not exceeding $2.48 million may be utilized upon completion of the Pre-Disbursement Conditions:

This shall be as follows:

	MR
(a) Balance of the land cost plus other cost associated to the land will be released	765,000.00
(b) Conversion Fee	300,000.00
(c) Brokerage Commission	35,000.00
(d) Subdivision and Registration Fees	230,000.00
(e) Legal Fees	100,000.00
(f) Advertising	150,000.00
(g) Project Management Fees	250,000.00
(h) Advance to Architect	250,000.00
(i) Preliminaries	400,000.00
Total:	2,480,000.00

b) The balance to be released progressively against Architect's/ Engineer's Certificate for work completed/approved invoices.

Thus it is clear that disbursements would be in two parts, that is under part (a) for the sum of RM2,480,000 and the second under part (b) for the balance sum of RM2,520,000. Furthermore the disbursements under part (a) did not require any documentations to be presented by Chendering together with the cheque in question, but disbursements under part (b) had to be supported by the specified documents.

Chendering was issued with a cheque book and the bank honoured cheques presented by Chendering in accordance with normal banking practice until the authorized limit of RM2,480,000 was reached.

It is also an undisputed fact that during a six month period from 17 March 1982 (that is, within six days of the execution of the Loan Agreement) and 11 September 1982, thirteen payments totaling RM2,553,196.60 were disbursed by the bank to Chendering. This represented an excess of RM73,196.60 of the RM2,480,000 under part (a). (See exh. P2).

Subsequently on 14 October 1985, the bank wrote to Chendering stating that it was exercising its right to recall the facility and demanded repayment of the sum of RM3,959,043.50 (as at date) which represented the sum expended to Chendering and all interest on the said sum. It was followed by a letter of demand from the bank's solicitors.

As regards the first suit, that is where the bank sued Chendering as principal borrowers, sixteen grounds have been raised before us, by the bank, which can be summarised as follows:

1. Grounds (1) & (2): Purported interruptions and interventions by the learned judge. However, at the outset of the appeal learned counsel for the bank indicated to us that he was not pursuing with these two grounds.

2. Grounds (3) & (4): Finding of liability on the part of the bank, including the alleged obligation to service interest on the part of Chendering and the purported right of the bank to review and cancel the agreement.

3. Grounds (6) to (10): The learned judge's assessment of the damages payable to Chendering as a result of the finding that the bank had acted in breach of the agreement.

4. Grounds (11) to (15): The findings of fact made by the learned judge based on the evidence before him.

5. Ground 16: The learned judge's finding as to mitigation of damages.

Grounds (3) & (4): (Finding Of Liability By The Trial Judge)

It is the primary submission of the bank that it was not in breach of contract. However the learned judge found as a fact that the bank and not Chendering which was in breach. Before coming to such a decision the learned judge had considered several issues, such as capitalization of interest, review of loan facility, purchase of quarry, conversion fees, disbursements and misuse of funds.

The learned judge found as a fact that this was a contract for a definite purpose which was clearly known to the bank and within its contemplation. It was also a term of the agreement that the interest due on the facility during the pre-construction period was to be capitalized. As such the learned judge held that the call on Chendering to service interest and the subsequent recall of the loan facility for non-payment of interest was unlawful and improper.

The learned judge found support in the Supreme Court case of *Bank Bumiputra Malaysia Bhd. Kuala Lumpur v. Mae Perkayuan Sdn. Bhd.* [1993] 2 CLJ 495 wherein the bank in that case, recalled the facility due to the failure of *Mae Perkayuan* to service interest on the loan. His Lordship Abdul Hamid Omar, LP (as he then was) had this to say: (at p. 501)

> We consider the bank was not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent is not obliged under the agreement to pay interest during the bridging period.

Thus in the light of the factual similarity between the agreement in these proceedings and that in *Mae Perkayuan* and the finding of the Supreme Court, we say that the bank is precluded from arguing otherwise.

Furthermore the fact that the facility was recalled for failure to service interest was confirmed by the bank's own witness PW1, during cross-examination. This fact was further corroborated by PW2. On capitalization of interest the bank's witness PW4, stated thus in his evidence: "When houses are built and income from them received, only then will income be used to service the interest and to redeem the title. The reason for capitalization of interest in the meanwhile is because there was no income until the houses are sold."

Similarly, with the other issues taken into considerations by the learned judge, that is purchase of quarry, refusal to pay conversion fees, disbursement and misuse of funds – we are also of the opinion that at the end of it all, the learned judge had made findings of fact which we are of the view that this court should not interfere, as the learned judge had the benefit of observing the credibility and demeanor of the witnesses, during the trial.

It is also the bank's submission that this is an appeal where appellate interference should take place because there has been no or insufficient judicial appreciation of the evidence by the trial judge. Learned counsel then enumerates the findings of fact which in his opinion, went against the weight of evidence presented at the trial:

(i) that the disbursement by the bank of RM669,000 to Chendering was not made under part (a) of the disbursements under the agreement;

(ii) that the disbursement of RM669,000 for the purchase of a quarry by Chendering was properly made because it came within one of the designated purposes in the agreement;

(iii) that the amount designated for conversion and sub-division fees had never been utilized by Chendering and that it remained an obligation of the bank to pay the said conversion fees to the land office on behalf of Chendering;

(iv) that there was no obligation on Chendering, as registered proprietor of the Kijal land, to pay conversion fees in respect of the said land;

(v) that the failure to proceed with the development project on the Kijal land was due to the bank's conduct or omission;

(vi) that the failure by Chendering to secure a developer's licence was an after-thought on the part of the bank and therefore too late for the bank to raise the point when in actual fact it was pleaded on behalf of the bank in para. 8 of its defence in the Chendering action;

(vii) that the bank could not recall the facility because of non-payment of interest on the part of Chendering;

(viii) that the bank could not recall the facility because Chendering did not commence the development project; and

(ix) that the bank could not recall because Chendering did not possess a developer's licence.

Again, after careful scrutiny of the learned judge's grounds of judgment, we find no basis to interfere with his findings. We wish to reiterate our earlier statement that the findings arrived at, were based on the learned judge's appreciation of the evidence before him and his assessment of the credibility and demeanor of the respective parties' witnesses.

Ground 11: Finding Of Fact Made By Learned Judge Based On The Evidence Before Him

It is clear that the whole problem between the bank and Chendering started with the drawdown of RM669,000 which the bank claimed was under part (a) of the facility, whereas Chendering claimed to be under part (b). The main witness for Chendering, was DW2. He gave evidence of his negotiations with Dato' Hashim Shamsuddin (the then Executive Director). The learned judge accepted his evidence and said: (at p. 39 para 14 Record of Appeal Jilid I & II)

> Thus from the above evidence, I am satisfied that this amount of RM669,000.00 is not for the purpose of the first stage of drawdowns.

Further on he said:

> There is no reason why I should not accept this part of the evidence of DW2.

Thus, we do not propose to disturb the learned judge's finding of fact.

Grounds 12 & 13: Refusal By Bank To Pay For Conversion Fees To Land Office – Review Of Overdraft Facility

Again, we see no basis to disturb the learned judge's finding of fact on these issues.

Ground 14: Acceptance By Learned Judge Of DW2's Evidence Which Was Not Supported By Contemporaneous Evidence

It was submitted by the bank that in view of the contradictions between DW2's oral evidence and his affidavit which was affirmed in April 1989, whether it was proper for the High Court to have relied wholly and exclusively on DW2's oral evidence. In reply learned counsel for Chendering stated that the affidavit was never relied on at trial. It was never put to DW2 to challenge his testimony. It was never part of the evidence before the High Court at trial. To this end he referred to the case of *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 3 CLJ 639 at p. 658, wherein the Court of Appeal stated thus:

> It is essential that a party's case be expressly put to the opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument.

Furthermore according to learned counsel for Chendering that reliance on DW2's affidavit is wholly in contravention to O. 7 r. 3A of the Rules of the Court of Appeal which states:

> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
>
> (a) at the hearing before the High Court or the Subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

He also referred to two other cases, namely *Teo Hock Guam & Anor (t/a Teo Meng Huah Construction) v. Johore Builders & Investments Sdn Bhd* [1996] 4 CLJ 184; *Renal Link (KL) Sdn Bhd v. Dato' Harnam Singh* [1997] 3 CLJ 225.

In any event he said, the contents of DW2's affidavit are of no assistance to the bank's stand, as the affidavit in fact reiterates the self same position that the respondents are now arguing, which is, that monies were expended for the purchase of the quarry; it does not in any way support the appellant's argument that no disbursements were made under para. (b) of the loan agreement.

Grounds 8 & 9: Trial Judges' Acceptance Of Exhibits "D-10" & "D-11"

Learned counsel for the bank submitted that the learned judge's finding that exh. "D10" (agreement dated 8 March 1982) between Chendering and MAE Bina Sdn Bhd was within the knowledge of the bank at the time when the bank decided to approve the overdraft facility (11 March 1982), is without any factual basis because of the fact that the bank was not a party to the said alleged agreement and no evidence was led by Chendering to prove that they were in fact submitted to the bank prior to 11 March 1982. Furthermore, exh. "D11" which represents an agreement dated 13 December 1982 could not possibly have been made known to the bank in March 1982.

Chendering's reply was that the learned judge had correctly adduced from exhs. "D10" and "D11" that Chendering was in a position to complete the project. Exhibit "D10" was an agreement between Chendering and Mohd Anuar & Co. whereby the latter was appointed by the former to manage the project as a developer of the land and exh. "D11" was an agreement with Mae Bina to carry out the project as contractor. On close scrutiny of the notes of proceedings it is clear that the exhibits were tendered by DW2 (Mohd. Anuar bin Embong) during cross-examination, (See Notes of Evidence – Rekod Rayuan Jilid 1 p. 285) to show that Chendering was able and willing to carry out and complete the project and to rebut the contentions of the bank that firstly, that Chendering had given up the project and secondly, that Chendering would not, in any event, have been able to carry out the project as it did not have a developer's licence. Furthermore, the matters raised were never put to DW2 in cross-examination and the exhibits were never challenged by the bank at trial. Thus, it is not open to the bank to object as to the admission of the same in evidence.

As regards Ground 9, that is bank's failure to produce the project paper submitted by DW2 to it at the time the application for the facility was made despite the issuance of the notice to produce issued by Chendering, again on scrutiny of the notes of proceedings it can be seen that evidence of the bank's witnesses confirmed that the project paper would have been submitted to the bank's counsel before the facility was granted. Therefore we are satisfied that in the absence of the availability of the project paper, the learned judge had correctly relied on secondary evidence in the form of exh. "D1" and the oral evidence of DW1 and DW2 to ascertain the extent of the profits that would have been made by Chendering if the project had been carried through. The learned judge also correctly took account of the fact that exh. "D1" was never challenged in cross-examination.

Now we turn to the second suit whereby Chendering sued the bank for damages for breach of the agreement dated 11 March 1982. The learned judge at the end of the trial awarded a sum of RM29, 279,017.58 as damages.

In the Memorandum of Appeal the bank raised the following grounds:

Grounds 5, 6, 7, 10, 15 & 16: Correct measure of damages; failure of Chendering to discharge its burden of proving actual loss that it suffers; mitigation of damages and remoteness of damages.

In the case of *Tan Sri Khoo Teck Huat v. Plenitude Holdings Sdn. Bhd* [1994] 3 MLJ 777 at p. 799, the Federal Court in restating the rule in *Flint v. Lovell* [1935] IKB 354 at p. 360, stated that: "an appellate court would be justified in interfering by reassessment of the damages only where the trial judge had acted on a wrong principle or has made an entirely erroneous estimate of the damages."

In *Flint v. Lovell*, Greer LJ had said:

> ... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

The law relating to damages for breach of contract is set out in s. 74 of the Contracts Act 1950 which has been held by the Supreme Court to be a restatement of the rule in *Hadley v. Baxendale* [1854] 9 Ex 341, in the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors.* [1993] 2 CLJ 495.

His Lordship Hamid Omar LP (as he then was) stated (at p. 503) as follows:

> It will be seen that the law in this country as to the measure of damages for breach of contract as provided under s. 74 of the Contracts Act 1950 is the same as in England, and requires that the damage or loss suffered must be within the contemplation of both parties. In this case, the bank had full knowledge from the very beginning that the project, if successfully and duly completed, would bring in a profit of about RM5.3m to the first respondent. The bank had studied every aspect of the project and had decided what amount was required by the first respondent as bridging finance before the first respondent could be expected to derive a profit from sales of dwelling houses. Once the first respondent commenced to derive such profit, it could be expected to apply the same towards reduction of its overdraft with the bank and completion of the project. It is public and common knowledge that where a financial institution withdraws its financial facility from a developer engaged in housing project, it becomes virtually impossible for the developer to obtain financial facilities from alternative sources.

See also MC Gregor on *Damages* 16th edn 1997; *Manchester & Oldham Bank Limited v. W.A. Cook & Co.* [1883] 49 LT 674 and *Toeh Kee Keong v. Tambun Mining Company Ltd.* [1968] 1 MLJ 39.

Learned counsel for the bank submitted that the proper measure of damages in this case should be the normal measure of damages under s. 74(1) of the Contracts Act 1950, that is the difference between cost of substitute loan in the market – hence nominal damages. With respect, we do not agree. We say that this was not a simple contract to lend money, but a contract for a definite purpose. Furthermore that purpose was clearly within the knowledge of the parties at the time of entering into the agreement and the consequence of its breach must have been within the contemplation of the parties. Thus all losses claimed by Chendering which arise out of the transaction between the parties arose naturally from the breach by the bank, and were also within the contemplation of the parties as likely to arise from such a breach within the requirements of s. 74 of the Contracts Act and the rule in *Hadley v. Baxendale* [1854] 156 ER 145, 151.

We are also of the opinion that the learned judge was correct to hold that once it is shown that the kind of damages claimed is foreseeable, then the guilty party is liable to the **full extent** (emphasis added) of it so long as the extent of damages has been shown on the balance of probabilities. (See *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd; Coulson & Co Ltd.* [1949] 2 KB 528 at 540; *Chitty On Contracts* 28th edn. 1999 para 27-045.

As such we are satisfied that the learned judge had correctly assessed damages upon a consideration of the legal principles and also upon an analysis of the similarity in facts between those in the present proceedings and in *Mae Perkayuan*.

On the bank's contention that no particulars of damages were pleaded, we are of the opinion that it is unsustainable. From the notes of proceedings it is clear that evidence was led by Chendering, through DW2, as to the extent of losses suffered. No objection was taken that particulars of such losses were not pleaded in the statement of claim and that such evidence was inadmissible. As such it is too late in the day for the bank to raise this objection. In *Oversea-Chinese Banking Corporation Ltd. v. Philip Wee Kee Puan* [1984] 2 CLJ 4; ([1984] 1 CLJ (Rep) 25) the Privy Council, through Lord Bridge of Harwich stated as follows:

> So, in the instant case, the only time when objection could have been taken to the admission in evidence of the respondent's letter of January 14, 1974, on the ground that the acknowledgement had not been pleaded, was when the evidence was tendered. It is true that if the objection had then been taken and application had been made to amend the pleadings, this could have been successfully opposed on the ground that by January 23, 1980 the right of action deemed to have accrued on the date of the letter had itself become statute-barred. But once the letter was received in evidence without objection this consideration became immaterial. The letter became part of the total material on which the judge had to decide the case and since the writ in the action had been issued well within the period of six years from the date of the letter, the bank's claim, if the letter constituted an effective acknowledgement, was not statute-barred.

We are also of the considered opinion that the damages awarded to Chendering in the sum of RM29,279,017.58 was not too remote, as the damages for loss of profits was based on computation as set out in exh. D1 which was in the possession of the bank and directly within its contemplation. (See *Mae Perkayuan* case *(supra)* and s. 74 Contracts Act 1950, applying the second limb of the rule in *Hadley v. Baxendale*).

On mitigation of damages, we agree with the learned judge's conclusion that Chendering had taken adequate steps to mitigate its losses. At p. 83 of the Rekod Rayuan (Jilid 1/II) para. 39, he said:

> I am satisfied over the evidence before me that Chendering had taken all reasonable steps to mitigate the loss without success.

In conclusion we say that this appeal is essentially premised on the findings of fact made by the learned judge based on his construction of the documents and the evidence before him. We find no basis to interfere with his findings which are arrived on his appreciation of the evidence before him and his assessment of the credibility and demeanor of the respective parties' witnesses.

For the abovesaid reasons we would dismiss this appeal with costs payable to the respondents. Deposit to be taken into account of taxed costs.

My learned brothers, Mokhtar Sidin and Pajan Singh Gill JJCA, have had an opportunity of reading this judgment in draft and have expressed their concurrence with it.